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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-545

UNITED STATES STEEL CORPORATION, Petitioner

v.

DAVID P. BLAIR, Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Your petitioner, United States Steel Corporation, respectfully prays that the Court reconsider its Order denying its Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled cause, entered by this Court on January 10, 1972, and grant the Petition.

As grounds for this Petition, petitioner respectfully requests the Court's consideration of the following:

I. PETITIONER WAS NOT THE OWNER PRO HAC VICE OF THE BARGE INVOLVED.

The barge or barges upon which respondent was working at the time of his alleged accident were admittedly owned by third parties. Prior to respondent being employed on the barges in question, the barges had been towed to petitioner's landing. Although petitioner did have limited possession and control of these barges while they were tied at its landing for loading

purposes, yet it had no authority to repair or maintain them and had no towing facilities for moving the barges except that by means of pulleys, petitioner's employees could move the barges some 50 feet in its own dock so as to facilitate the loading of the same.

The evidence in this case discloses no agreement either written or oral between the owners of said barges and the petitioner herein with respect to chartering of the barges either as a bareboat or time charter, the custom being that once the barges were brought to petitioner's landing they would be loaded with pipe and, after loading had been completed, petitioner would notify either the owner or a barge line company to pick up the loaded barge and take it to its destination.

In the District Court's 20th Finding of Fact it was stated as follows:

> "20. The ownership of the barge vessel has not been firmly established, although it appears certain that it was not owned by defendant at the time of the accident. This fact is immaterial, in my considered judgment. It matters not whether the defendant was the owner, charterer, lessee or bailee of the barge vessel or whether the defendant had a right of possession on an hourly, daily, yearly or monthly basis. Since the barge vessel was in the sole and absolute control of the defendant, liability for the unseaworthy condition must exist against said defendant."

From the above finding of fact it can be seen that the District Court made no determination as to whether your petitioner was a bareboat charterer or time charterer of the barge involved, or in fact whether there was

any charter of the vessel. The court clearly stated that it was immaterial whether your petitioner was the owner, charterer, lessee or bailee of the barge; that since it was in sole and absolute control of the barge, it was liable for any unseaworthy condition thereon. Since the court has determined that your petitioner was not the owner of the barge at the time involved, in order to hold your petitioner liable it was incumbent upon the court to find as a fact that petitioner was the bareboat charterer and therefore its owner *pro hac vice*. No such finding was made by the court.

In Norris on *Maritime Personal Injuries,* Second Edition, Section 85 at page 212, the author gives the distinguishing features of the types of charter parties as follows:

> "*Demise or Bareboat Charter*. The vessel is chartered or 'leased' to another who takes possession, custody and control of the vessel. The master is hired and paid by the charterer and is the agent and representative of the charterer. The demise charterer becomes the employer of the master and the crew. As owner *pro hac vice* he is responsible for personal injuries caused by them under the doctrine of *respondeat superior*. The operating expenses of the vessel, such as wages, fuel, subsistance, wharfage charges, etc., are paid by the charterer. The owner surrenders entire control and possession of the vessel and subsequent control over its navigation to the bareboat charterer, who becomes the owner *pro hac vice*.
>
> "*Time Charter*. The vessel is chartered or 'leased' to the charterer for a fixed period of time.

Custody and control remains with the vessel owner. The vessel owner hires, pays and is the employer of the master and crew. The owner pays all of the operating expenses of the vessel and the time charterer merely has the use of the vessel in return for his payment of the charter hire.

"*Voyage Charter.* It is similar in all respects to the time charter, except that the ship is hired for a single voyage."

As stated above, in order to constitute a bareboat charter the owner must surrender entire control and possession of the vessel and subsequent control over its navigation to said bareboat charterer who then becomes the owner *pro hac vice.* Although your petitioner had in effect limited control of the barges in question while they were tied up at its landing and during the loading thereof, yet it did not have such possession and control as to constitute operational or navigational interest in the vessels.

In the case of *Guzman v. Pichirilo,* 369 U.S. 698, 8 L.Ed.2d 205 (1962), the court at pages 699-700 stated as follows:

"To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. *United States v. Shea,* 152 U.S. 178 (1894); *Leary v. United States,* 14 Wall. 607 (1872); *Reed v. United States,* 11 Wall. 591 (1871). See generally Gilmore & Black, The Law of Admiralty, 215-219; Robinson, Admiralty, 593-601; Scrutton, Charterparties (16th ed., McNair & Mocatta), 4-7. It is therefore tantamount to, though just short of, an

outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. . . ."

In the case of *James Miller v. Union Barge Line Corporation, et al.,* 299 F.Supp. 718 (W.D. Pa., 1969), the plaintiff, a longshoreman, was employed by the Port of Louisville, a stevedoring enterprise, and was injured aboard a barge belonging to Union Barge Line Corporation. The barge was in navigable waters at the time and the injury was caused by a defective hatch cover lock. Union Barge Line Corporation claimed that the barge in question was under bareboat charter to the co-defendant, Southern Transfer Company. Defendant Southern Transfer Company argued that the vessel was not in its possession or control at the time of the accident, that it was entirely in the possession and control of plaintiff's employer, Port of Louisville, which accepted delivery of the barge for unloading purposes before the accident. In discussing the question of a demise or bareboat charter, Judge Weber, at page 720, stated as follows:

"The demise or bare boat charter which relieves an owner of liability for seaworthiness must be a complete and exclusive relinquishment of possession, command and navigation. It is therefore tantamount to, though just short of, an outright transfer of ownership. Anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. The owner has the burden of showing such a charter. This burden is heavy for the courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed.2d 205 (1962).

"While the comparison between large ocean going vessels and unmanned and unpowered river barges is farfetched, nevertheless, we attempt to apply the same admiralty principles, and we cannot find that the delivery of a loaded barge to a stevedoring company for unloading amounts to the condition of being 'tantamount to, though just short of, an outright transfer of ownership' described in Guzman v. Pichirilo, supra, p. 700, 82 S.Ct. p. 1096."

In the case of *Bellomy v. Union Concrete Pipe Co.*, 297 F.Supp. 261 (S.D. W. Va. 1969); aff'd per curiam 420 F.2d 1382 (1970); cert. denied 400 U.S. 904 (1970), the plaintiff brought an action for damages for personal injuries under the Jones Act and the doctrine of unseaworthiness against his employer. Plaintiff was employed as a crane operator by Union Concrete Pipe Company, which crane was located upon a dock owned by the defendant on the bank of the Ohio River and was utilized for the purpose of unloading sand, gravel and other material from floating barges tied to the dock. As part of his duties, plaintiff was occasionally required to go aboard a barge for the purpose of moving it along the dock in connection with the unloading operations. While thus engaged upon a barge tied to the dock, he was injured. In his opinion granting defendant's motion to dismiss, the District Court at pages 265-266 stated as follows:

"The doctrine of unseaworthiness, whereby a duty is imposed upon the owner of a vessel to furnish a seaworthy ship, has no application to the facts of this case inasmuch as the defendant in this action is not the owner of the boat nor was the boat in its possession or under its control at the time plaintiff

was injured. Watson v. Gulf Stevedore Corporation, 374 F.2d 946 (5th Cir., 1967). This case is distinguishable from Reed v. The YAKA, supra, since in that case the plaintiff's employer, the defendant in the suit, was also the bareboat charterer, or owner *pro hac vice,* and as such was liable for unseaworthiness. . . ."

II. PETITIONER HAD NO OWNERSHIP OR OPERATIONAL INTEREST IN THE VESSELS INVOLVED.

Prior to *Reed v. Yaka,* 373 U.S. 410; 10 L.Ed.2d 448 (1963), the vessel owner alone owed to the longshoreman the nondelegable obligation to maintain a seaworthy vessel and as a result the longshoreman had the right to sue the vessel owner *in personam* or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp. v. Dugan & McNamara,* 364 U.S. 421, 424 5 L.Ed.2d 169 (1960). In *Reed v. Yaka, supra,* your Honorable Court for the first time held that a bareboat charterer was presumably liable for the unseaworthiness of the chartered vessel.

In reviewing the various decisions since *Reed v. Yaka* involving the right of a longshoreman to sue his employer for damages for unseaworthiness in cases where the employer is not the owner of the vessel, it has been generally held that the longshoreman can recover from the employer only where his employer is the bareboat charterer of the vessel involved, which includes having an operational or navigational interest in the vessel. In *Watson v. Gulf Stevedore Corporation,* 374 F.2d 946 (5th Cir., 1967); cert. denied 389 U.S. 927

(1967), the court held that an injured longshoreman who was doing work traditionally done by seamen can maintain an action for unseaworthiness, but such action must be against the vessel *in rem* or the owner of the vessel *in personam* and cannot go directly against a stevedore-employer having no ownership or operational interest in the vessel.

In the case of *Savard, et al. v. Marine Contracting, Inc. and Perini Corporation,* 296 F.Supp. 1171 (D. Conn., 1969), decedent, an employee of defendant Marine Contracting, Inc., was engaged in diving operations on the barge CHOCTAW for defendant Perini Corporation. The barge was anchored in the navigable waters in Narragansett Bay. During the course of a dive, decedent was killed. In discussing the various remedies of a longshoreman under the circumstances therein involved, Chief Judge Timbers, at pages 1174-1175, stated as follows:

> "The exclusivity provision of § 905 of the Longshoremen's Act does not bar actions by maritime workers against employers who are also shipowners. See Jackson v. Lykes Bros. S.S. Co., Inc., 386 U.S. 731 (1967), following Reed v. The Yaka, 373 U.S. 410 (1963). See also Scopaz v. S.S. Santa Luisa, 372 F.2d 403 (2 Cir.), cert. denied, 387 U.S. 922 (1967). However, *Jackson* did not nullify the effect of the exclusivity provision of § 905 when the defendant employer is not the owner or lacks other operational interest in the vessel involved in the litigation. See Watson v. Gulf Stevedore Corp., 374 F.2d 946 (5 Cir.), cert. denied, 389 U.S. 927 (1967). Although a maritime worker can sue a vessel owner in personam or the vessel in rem for injuries caused by the vessel's unseaworthiness, and such

owner can seek indemnification against the worker's employer for breach of its warranty of workmanlike service, the maritime worker cannot subrogate himself to the owner's rights in a direct action against the employer. Instead, he must pursue his remedy, as against his employer, solely under the Longshoremen's Act. *Watson,* supra."

In the case of *Rao v. Hillman Barge & Construction Company,* 326 F.Supp. 1091 (W.D. Pa., 1971), now on appeal to United States Court of Appeals for the Third Circuit, plaintiff was employed as a painter's helper in defendant's shipyard. A barge belonging to United States Steel Corporation was hauled out of the water for repairs. Plaintiff carried spray paint equipment aboard the beached barge and was injured in removing the cap from the pressurized spray paint tank. Although the employer paid compensation to the plaintiff under the provisions of the Longshoremen's and Harbor Workers' Compensation Act which he accepted, he nevertheless sought to recover damages under the Jones Act and for unseaworthiness of the vessel. The case was first submitted to a jury which made a finding that the plaintiff was not a seaman. The case then proceeded before the Court without a jury as to plaintiff's alleged remedy for unseaworthiness. In dismissing plaintiff's claim, the District Court, in its opinion at page 1093, stated as follows:

"Plaintiff also alleges error in the court's refusal to submit the question of unseaworthiness to the jury after the finding that he was not a seaman, arguing that in any event, whether a seaman, a longshoreman, or an industrial worker, under the State Workmen's Compensation Act, he is still en-

titled to the maritime remedy for injury due to unseaworthiness. We refused this because the only defendant here is his employer, and the defendant was not the owner or charterer of the vessel at the time of the injury. The longshoreman's remedy for unseaworthiness is limited to an action *in rem* against the vessel, or against its owner or charterer. Jackson v. Lykes Bros., S.S. Co. 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488 (1966); Reed v. The Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963); Thomas v. Peterson Marine Service, Inc., 411 F.2d 592 (5th Cir., 1969)."

Although the various decisions on the question herein involved have stated that the longshoreman cannot recover for unseaworthiness against his stevedore-employer having no ownership or operational or navigational interest in the vessel, we find no opinion in which the court attempts to define "operational" or "navigational" interest in the vessel. The factor of control is very important in distinguishing the demise charter from the time and voyage charters. If the vessel owner retains the possession, command and navigation of the ship, merely carrying the charterer's goods, then, irrespective of how the charter party may be labeled, it is either a time or voyage charter and not a bareboat charter. As has frequently been stated, "to create a demise the owner of the vessel must completely and exclusively reliquish possession, command and navigation thereof to the demisee. It is therefore tantamount to, though just short of, an outright transfer of ownership."

The evidence in this case clearly shows that while petitioner had limited control and possession of the

barge while it was tied up in its landing, yet it did not have such complete possession and control and operational and navigational interest therein so as to constitute it the owner *pro hac vice*.

CONCLUSION

For these reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, the undersigned counsel for petitioner herein, do hereby certify that the within Petition for Rehearing of Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay, and we do further certify that the within Petition is restricted to substantial grounds, particularly citations not previously presented to this Court.

GILBERT J. HELWIG

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